(1976) 03 AHC CK 0023

In the Allahabad High Court

Case No : Special Appeal No. 173 of 1975, and Civil Miscellaneous Writ Petition Nos. 4075 etc. of 1975

On difference of opinion between Judges constituting the Division Bench hearing special against C. Misc. W. P. No. 441 of 1975 reported in 1975 All WC 440. (Single Bench) — APPELLANT

Vs

On difference of opinion between Judges constituting the Division Bench hearing special against C. Misc. W. P. No. 441 of 1975 reported in 1975 All WC 440. (Single Bench) — RESPONDENT

Date of Decision : 22-03-1976

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Excise (Amendment) Rules, 1970 — Rule 13(b)
Uttar Pradesh Excise Act, 1910 — Section 31, 41(a), 41(e)(v)

Citation : (1976) 03 AHC CK 0023

Hon'ble Judges : G.C.MATHUR, J

Final Decision : Disposed Of

Judgement

G. C. MATHUR, J.—(On difference of opinion between the Judges constituting the Division Bench before the Special Appeal came for hearing):

Consequent upon a difference of opinion between the learned Judges constituting the Bench hearing the Special Appeal and the writ petitions the following three questions have been referred to me for opinion :

1. What is the true interpretation and scope of S. 41 (e) (v) of the U. P. Excise Act?

2. Whether the Excise Commissioner can make R. 13B in exercise of his powers under the U. P. Excise Act?

3. Whether the closure of the licensed premises on Tuesdays as a condition in the licence of the petitioner became a binding term of the contract and the licensee could not be allowed to avoid it through a petition under Art. 226 of the Constitution?

2. The U. P. Excise Act, 1910, makes provisions relating to the import, export, transport, manufacture, sale and possession of intoxicating liquors and intoxicating drugs. S. 3 of the Act defines in subss. (11) and (12) "liquor" and intoxicating drugs. Subs. (13) defines "intoxicant" to mean any liquor or intoxicating drug as defined in the Act. S. 21 provides that no intoxicants shall be sold without a licence from the Collector. S. 31 deals with the form and condition of licences. S. 10 confers powers on the State Government to make rules for the purpose of carrying out the provisions of the Act or other law for the time being in force relating to excise revenue. S. 41 empowers the Excise Commissioner to make rules with the previous sanction of the State Government. The relevant part of this Section reads as follows:

"41. The Excise Commissioner, subject to the previous sanction of the State Government may make rules

(a) Regulating the manufacture, supply, storage or sale of intoxicants including

. . . .

(e) Prescribing the restrictions under and the conditions on which any licence, permit

or pass may be granted, including provision for the following matters :

(i) . . . .

(v) the fixing of the days and hours during which any licensed premises may or may not be kept open and the closure of such premises on special occasions.

(vi) . . . .

3. Under the Act as it stood before its amendment in 1923, the power to make rules under S. 41 was conferred on the Chief Revenue Authority. Under this power the Board of Revenue framed the U. P. Excise Rules, 1910. By a notification dated January 2, 1971, the Excise Commissioner in exercise of the power under S. 41 (e) (v) of the Act made the U. P. Excise (Amendment) Rules, 1970. These Amendment Rules introduced the following Rules 13A and 13B:

"13A. Every shop licensed for the sale of

1. Country spirit.

2. Tari.

3. Foreign liquor for consumption on and off the premises.

shall be kept closed on the day following the burning of Holi and on the principal Diwali day.

Exception This condition does not apply to railway refreshment rooms, dining cars and such hotels and restaurants which are licensed for the sale of foreign liquor to foreign tourists.

"13B. All excise shops including foreign liquor, country spirit, hemp drugs, opium, tari and outstill shops shall remain closed on Independence day (August 15), Mahatma Gandhi Birthday (Oct. 2) and on the day of Mahatma Gandhis tragic death (Jan. 30) every year and also on all Tuesdays:

Provided that the Excise Commissioner may in consultation with the Collector of the District concerned waive the condition of keeping on excise shop closed on Tuesday for such specified period as he may think fit, in the case of hotels possessing a licence in Form F. L. 6 for the sale of foreign liquor for the benefit of such foreign tourists as may hold a valid permit under the All India Liquor permit Scheme of the Government of India."

As a consequence of the making of R. 13B a condition was added in licences for the retail sale of liquor providing that all licensed shops shall remain closed on the following days every year:

(i) Independence day (August 15),

(ii) Mahatma Gandhis birthday (October 2),

(iii) Mahatma Gandhis death day January 30),

(iv) On each Tuesday.

All licences hereafter for the retail sale of liquor were granted subject to this condition.

4. A large number of writ petitions were filed in this Court challenging the validity of Rule 13B in respect of closing of the excise shops on all Tuesdays. A learned Single Judge allowed Writ Petition No. 441 of 1975 and special Appeal No. 173 of 1975 was filed by the state Government against that judgment. This special Appeal together with the writ petitions came up for hearing before a Division Bench. One of the learned Judges was for dismissing the Special Appeal and allowing the writ petitions, while the other was for allowing the appeal and dismissing the writ petitions. Hence this reference.

5. The first question referred relates to the true interpretation and scope of S. 41 (e) (v) of the Act. The real question is whether this provision permits the Excise Commissioner to make a rule for the closure of licensed premises on every Tuesday. Subcl. (v) of clause (e) of S. 41 is in two parts: The first part empowers the Excise Commissioner to make rules, fixing the days and hours during which any licensed premises may or may not be kept open. The second part empowers him to make rules for the closure of licensed premises on special occasions. It was contended by learned counsel for the licensees that the two parts provided for different contingencies and, closure being specifically provided for in the second part, no rule for closure can be made under the first part. It was urged that the words may not be kept open do not mean closure. There is really no difference between closure and not keeping open. Whether the rule directs a licensed premises to be closed or whether it directs the licensed premises not to

be kept open during a particular period or on a particular day means the same thing. It is, therefore, not correct to say that, under the first part, no rule can be made for the closing of licensed shops.

6. Admittedly, every Tuesday is not a special occasion and a rule for the closure of licensed premises on every Tuesday cannot be made under the second part of subcl. (v). The question is whether such a rule can be made under the first part of subcl. (v). This part empowers the making of a rule, "fixing days and hours" during which a licensed premises may or may not be kept open. The normal meaning of the expression fixing days and hours is fixing days as well as hours. That is the normal result of using the word and between days and hours. Read thus, the first part empowers the making of rules fixing the

days as well as the hours during which licensed premises may or may not be kept open. But it is contended for the licensees that the words fixing days and hours really mean fixing hours of the day. There is no warrant for changing the language of the subclause in this manner. If the Legislature intended to empower the Excise Commissioner only to fix the hours of the day during which the licensed premises may or may not be kept open, it could have used the language suggested by the licensees. If this were the intention, the word days and in subcl. (v) were unnecessary and the words fixing hours during which licensed premises may or may not be kept open would have been sufficient to achieve the object. The language of the first part of subcl. (v) is unambiguous and clearly empowers the Excise Commissioner to make rules, fixing the days as well as the hours during which the licensed premises may be kept open or kept closed.

7. Learned counsel also relied on the observations of the Supreme Court in Sambhu Nath Sarkar v. State of West Bengal, AIR 1973 SC 1425 where it has been said that the word and in cl. 7 (a) of Art. 22 of the Constitution has been used in the conjunctive sense. Clause 7 (a) provides:

"(7) Parliament may by law prescribe

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of subcl. (a) of cl. (4)." The observations of the Supreme Court relief on read thus:

"In this view, the meaning of the word and in that clause must be held to have its ordinary conjunctive sense, the context in that clause also requiring not the opposite but its commonly understood sense, requiring Parliament to prescribe both the circumstances and the classes of cases in which only consideration by the Board can be dispensed with."

If these observations are applied to the interpretation of subcl. (v) of Cl. (e), the Excise Commissioner must make rules both with respect to the days as well as the hours during which licensed premises may be kept or not kept open. The observations of the Supreme Court do not support the contention of the licensees.

8. It was next contended that the closing of the licensed premises on every Tuesday will curtail the period of the licence and the power to do so is vested in the State Government and not in the Excise Commissioner. If the closing of licensed premises on Tuesdays will curtail the period of the licence, so will the closure on special occasions do. But it is not urged that the Excise Commissioner cannot make a rule regarding closure on special occasions. The closing of licensed premises on Tuesday does not really curtail the period of the licence. The licence remains effective for the entire period for which it was granted. The closure of licensed premises on any particular day or on any particular occasion does not, in any way, shorten the period of the licence.

9. It was then urged that, if the licensed premises can be closed on any day by a rule under the first part of subcl. (v), the second part of this subclause would become redundant. The contention is that the Excise Commissioner would be enabled to make a rule for closure of licensed premises also on days on which special occasions fell. This is not quite correct. The first part talks of days, that is to say, days of the week or the month or the year and the second part talks of special occasions, such as Holi, Diwali, Muharram, festivals, melas, elections etc. Under the second part, Rule 13A has been made, providing for closure on the days following the burning of Holi and on the principal Diwali day. Since the special occasions do not fall on the same day in every year, a power has been conferred to make rules for the closure by reference to special occasions. The second part of subcl. (v) thus cannot be said to be redundant.

10. On a true interpretation of S. 41 (e) (v) of the U. P. Excise Act, I am of opinion that it empowers the Excise Commissioner to make a rule, fixing the days as well as the hours during which licensed premises may be kept open or kept closed and that R. 13B could validly be made under this provision.

11. The next question referred is whether the Excise Commissioner could make R. 13B in exercise of his powers other than those conferred by subcl. (v) of cl. (e) of S. 41. This question arises on the assumption that the Excise Commissioner could not make R. 13B under subcl. (v). The learned Standing Counsel urged that, in that event, R. 13B is justifiable under three provisions, that is to say, under the main part of cl. (e) of S. 41, under the main part of cl. (a) of S. 41 and under S. 31.

12. The main part of cl. (e) empowers the Excise Commissioner to make rules, prescribing the restrictions under and the conditions on which any licence, permit or pass may be granted. The later part of this clause provides that this power shall include the power

to make provisions for the matters enumerated in subcls. (i) to (viii). Prescribing the restrictions under and the conditions on which the licence may be granted clearly embraces the fixing of the days on which the premises, for which the licence is granted, may be kept open or kept closed. The argument of the licensees is that the use of the word including in clause (e) shows that the matters enumerated in subcls. (i) to (viii) are outside the main provision of clause (e). The argument is based on the following observations of the Supreme Court in Commissioner of Incometax v. M/s. Taj Mahal Hotel, AIR 1972 SC 168 :

"The word includes is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute."

Where a definition given in a statute is an inclusive definition, it has been held that the matters included are normally not within the scope of the word defined but are added to it by the inclusion. But cl. (e) of S. 41 is not a definition clause and it is very doubtful whether this rule of interpretation can be applied to it. The argument of the licensees is selfdefeating. The argument is that what is included in subclauses (i) to (viii) is necessarily outside the main part of cl. (e). The licensees case is that the power to make rules fixing days on which the licensed premises may be closed, is not included in subcl. (v). It is also not included in the other subclauses of clause (e). It could be held to be excluded from the main part of clause (e) only if it was included in subclause (v) or in any of the other subclauses. What is not included in subcls. (i) to (viii) is not excluded from the main provision of cl. (e) if otherwise, on the language, it is included therein. Since the language of the main part of cl. (e) is wide enough to include the power to make rules fixing days on which the licensed premises may be kept closed and since such a power, according to the licensees themselves, is not contained in subclause (v) or in any of the other subclauses, it is not excluded from the main provision. The result is that if R. 13B cannot be justified under subcl. (v), it can certainly be justified under the main part of clause (e).

13. The main part of clause (a) of S. 41, which has been quoted above, empowers the Excise Commissioner to make rules regulating the manufacture, supply, storage or sale of any intoxicant. Clause (a) is not concerned with the conditions of licences which subject is specifically covered by clause (2). R. 13B is concerned with the opening and closing of licensed premises and not with regulating sales of liquor. This subject is dealt with in clause (e) (v). Of course, the closing and opening of licensed premises will affect sales also but the rule is not one for regulating sales but is essentially one for closure of licensed premises on certain days. This rule cannot be justified under S. 41 (a).

14. The learned Standing Counsel also sought to justify R. 13B under S. 31. This section reads as follows:

"31. Form and conditions of licences, etc. Every licence, permit or pass granted under this Act shall be granted

(a) on payment of such fees (if any),

(b) subject to such restrictions and on such conditions,

(c) shall be in such form and contain such particulars, as the Excise Commissioner may direct either generally or in any particular instance in this behalf, and

(d) shall be granted for such period as the State Government may, in like manner, direct."

The section is somewhat clumsily drafted. Though the words as the Excise Commissioner may direct either generally or in any particular instance in this behalf have been put at the end of cl. (c), they obviously govern all the three cls. (a), (b) and (c). Clauses (a), (b) and (c) of S. 31 do not confer any power on the Excise Commissioner either to prescribe the amount of the licence fee or the terms and conditions of the licence or the form of the licence or the particulars which should be contained therein. Likewise, clause (d) does not confer any power on the State Government to prescribe the period of the licence. S. 31 only provides that a licence shall be granted on payment of fees prescribed by the Excise Commissioner that it shall be subject to the terms and conditions prescribed by the Excise Commissioner, that it shall be in such form and contain such particulars as may be prescribed by the Excise Commissioner and that it shall be for such period as may be prescribed by the State Government. The Excise Commissioner can prescribe these things only by making rules under S. 41 and the State Government can prescribe the period of the licence only by making rules under S. 40 (2) (e). The Excise Commissioner can prescribe the licence fee by making a rule under cl. (c) of S. 41 and can prescribe the terms and conditions as well as the form of the licence by making a rule under Cl. (e) of S. 41. S. 31 confers no power on the Excise Commissioner to give a direction that a licence shall be granted subject to the condition that the licensed premises shall remain closed on all Tuesdays. Until a valid

rule is made to that effect under S. 40 by the State Government or under S. 41 by the Excise Commissioner, no such condition can be imposed under S. 31. R. 13B, therefore, cannot be justified under S. 31.

15. In my opinion, R. 13B can be justified under the main part of clause (e) of S. 41 but not under clause (a) of S. 41 or under S. 31.

16. So far as the third question is concerned, in view of my opinion on the first two questions, it does not really arise for consideration. It arises only on the assumption that R. 13B is ultra vires the powers of the Excise Commissioner. If the rule regarding closure on Tuesdays is invalid, its incorporation in the licence as a condition or term thereof will not make it a binding condition. Licences have been granted by the Collector who has no power to add any term or condition in the licence which is not covered by some provision of a valid rule made either by the State Government or by the Excise Commissioner. A term of the licence, which is based on an invalid rule, is itself invalid. An invalid term or condition of a licence cannot be enforced and the licensee cannot be estopped from challenging it through a writ petition under Art. 226 of the Constitution. There is another aspect of this matter. Rule 349 in the U. P. Excise Manual reads thus:

"349. (1) Every shop shall, unless exempted by the Excise Commissioner or any officer not below the rank of Excise Inspector to whom he may delegate this power, be kept open every day throughout the year and the licenceholder shall maintain at his shop a minimum quantity of the intoxicant for which he holds the licence and the same shall be fixed by the Collector for each shop with due regard to the normal demand of consumers in the locality."

This rule enjoins that the licensed premises shall be kept open on every day during the year. It will operate until superseded or amended by a valid rule made either by the State Government or by the Excise Commissioner. If Rule 13B, in so far as it requires the closing of licensed premises on Tuesdays, is invalid or void, R. 349 will remain in operation and neither the Excise Commissioner nor the Collector can require the licensees to close their licensed premises on Tuesdays. A condition in the licence contrary to R. 349 will be void. The licensees cannot be estopped from invoking provisions of R. 349 merely on account of the void condition incorporated in their licences contrary to R. 349. It is well settled that there is no estoppel against statute or statutory rules.

17. My answers to the three questions referred are as follows:

1. On a true interpretation of S. 41 (e) (v) of the U. P. Excise Act, subcl. (v) empowers the Excise Commissioner to make a rule fixing the days as well as the hours during which licensed premises may be kept open or kept closed. R. 13B could validly be made under this provision;

2. The Excise Commissioner could make R. 13B in exercise of his powers under the main part of cl. (e) of S. 41 also but he could not make the rule in exercise of his powers either under cl. (a) of S. 41 or under S. 31; and

3. If R. 13B, in so far as it relates to the closure of licensed premises on Tuesdays, is ultra vires and void, its incorporation in the contract of the licensees will not make it a binding term of contract and the licensees will be entitled to avoid it through a petition under Art. 226 of the Constitution.

18. The appeal and the writ petitions may now be placed before the Bench concerned with my opinion.

Answer accordingly.

